No. 44731-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Larry Stigall,

Appellant.

Clallam County Superior Court Cause No. 13-1-00040-6

The Honorable Judge S. Brooke Taylor

Appellant's Reply Brief

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I. THE COURT ERRED BY FINDING THE PROTECTION ORDER VALID.

The trial court acts as a gatekeeper and must exclude a legally invalid order. *State v. Miller*, 156 Wn.2d 23, 32, 123 P.3d 827 (2005). A protection order is not valid unless the respondent receives timely notice of the hearing. RCW 26.50.060(5).

The state charged Mr. Stigall with violating an order without any proof that he'd even been served with notice of the hearing. Ex. 1.

Nonetheless, Respondent argues that the collateral bar rule prohibits Mr. Stigall from challenging the validity of the order. Brief of Respondent, pp. 10-12. The state argues that Mr. Stigall can only bring a jurisdictional challenge upon being charged for violating the order, citing *City of Seattle v. May*, 171 Wn.2d 847, 852, 256 P.3d 1161 (2011); Brief of Respondent, pp. 11-12. But *May* stands for a different proposition. A person may challenge the order as void because the court lacks the power to issue the *type* of order. *May*, 171 Wn.2d at 852-53.

Here, the issuing court only possessed the authority to enter an *ex parte* order for a maximum of fourteen days because it did not have proof that Mr. Stigall had been served. RCW 26.50.070(4). Instead, the court purported to issue a permanent order, which Mr. Stigall allegedly violated

almost a year later. Ex. 1. The court lacked the statutory authority to enter the type of order. The collateral bar rule does not prohibit Mr. Stigall's claim. *May*, 171 Wn.2d at 852-53.

The state also argues that the order was valid because "Mr. Stigall had the power in his hands" to challenge it after it was issued. Brief of Respondent, pp. 13-14. But the statute does not authorize the court to place the burden upon the respondent to schedule a hearing to contest a permanent order. RCW 26.50.050. Rather, the court lacks the authority to issue such an order in the first place unless the respondent was served with notice of the hearing. RCW 26.50.060(1).

Next, Respondent argues that the order against Mr. Stigall was valid because the court got notice of service after the order was entered. Brief of Respondent, pp. 12-13. The statute provides that a court has authority to enter a permanent protection order only "[u]pon notice and after hearing." RCW 26.50.060(1). The statute only confers power to issue a permanent order when the court has proof that the respondent has notice of the hearing. The plain language leaves no room for interpretation. The state does not cite to any authority for its construction against the plain language of the statute. *See* Brief of Respondent, pp. 12-13.

The document purporting to prove that Mr. Stigall had been served with notice of the hearing was signed by someone other than the person who claims to have performed the service. The state's final argument on this point is that this document was properly admitted. Brief of Respondent, pp. 14-15. This is based on speculation that the lower court "knew that Pamela J. Hoffman is a Clallam County Sheriff's Department employee." Brief of Respondent, p. 15. But Hoffman's status as a sheriff's department employee does not confer her with personal knowledge of whether Mr. Stigall was properly served. The prosecutor claims that "whether the trial court as a gate keeper believed that law enforcement provided adequate notice to Mr. Stigall is within the trial court's province." Brief of Respondent, p. 15. But it was uncontested that the issuing court did not have proof that Mr. Stigall had been served when it issued the order.

The court abused its discretion by admitting the proof of service, which was not signed by the person who claimed to have served Mr. Stigall. Ex. 3. The issuing court lacked authority to enter a permanent protection order. RCW 26.50.050; RCW 26.50.060(5); RCW 26.50.070(4). The trial court erred by permitting the order to go to the jury. *Miller*, 156 Wn.2d at 32. Mr. Stigall's conviction must be reversed and the case dismissed with prejudice. *Id.*

II. THE TRIAL COURT MISINTERPRETED ER 404(B) AND VIOLATED MR. STIGALL'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY IMPROPERLY ADMITTING PROPENSITY EVIDENCE.

A conviction based in part on propensity evidence is not the result of a fair trial. *Garceau v. Woodford*, 275 F.3d 769, 777-778 (9th Cir. 2001), *reversed on other grounds at* 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003); *see also Old Chief v. United States*, 519 U.S. 172, 182, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). Over Mr. Stigall's objection, the court allowed the state to introduce multiple allegations of uncharged prior no contact order violations and photos of uncharged damage he had allegedly caused to White's mailbox. RP 43, 51-53, 68-71, 81; Ex. 8.

A. The prior acts were not admissible to show a common scheme or plan.

The Supreme Court has called for caution in applying the common scheme or plan exception to the general prohibition on evidence of prior bad acts. *State v. DeVincentis*, 150 Wn.2d 11, 18-19, 74 P.3d 119 (2003). Here, Mr. Stigall's alleged prior acts suggest a similarity of results, rather than a "general plan." *State v. Lough*, 125 Wn.2d 847, 860, 889 P.2d 487 (1995).

Respondent argues that the prior bad acts demonstrated a common scheme or plan because, without the information, "the jury would have been left wondering why – out of the blue – [Mr. Stigall] decided to

assault [White]." Brief of Respondent, p. 20. But propensity evidence does not become admissible merely because it would provide the jury with more information. Rather, evidence of a common scheme or plan is admissible if it shows a "strong indication of a design (not a disposition)." *Lough*, 125 Wn.2d at 858-859 (quoting 2 JOHN HENRY WIGMORE, EVIDENCE § 375, at 335). The evidence against Mr. Stigall demonstrated a disposition, not a design. *Id.*

Indeed, all propensity evidence provides the jury with additional information. This information, however, leads to the risk that the jury will use it to make an impermissible propensity-based inference. Mr. Stigall does not challenge the admission of White's testimony that the couple had previously dated and that she eventually sought a protection order. The jury would not have been left with the impression that he was alleged to have assaulted her "out of the blue."

The propensity evidence against Mr. Stigall was not admissible to demonstrate a common scheme or plan. Mr. Stigall's conviction must be reversed and the case remanded with instructions to exclude evidence of the prior acts. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

B. The prior acts were not relevant to prove an element of the offense.

Respondent argues that the evidence of Mr. Stigall's prior acts was relevant to prove his intent. Brief of Respondent, pp. 19-20 (citing *State v. Powell*, 126 Wn.2d 244, 261, 893 P.2d 615 (1995)).

But intent is not an element of the offense with which Mr. Stigall was charged. RCW 26.50.110. In *Powell*, the court admitted evidence of prior assaults by the husband on the wife in a trial for her murder. *Powell*, 126 Wn.2d at 264. The court held that such evidence is admissible in a murder case, especially where malice and motive are at issue. *Id.* at 261-62. The court noted that evidence of alleged prior misconduct is only admissible if it is necessary to prove a material issue. *Id.* at 262. In fact, the *Powell* court held that the prior acts evidence in that case was not admissible to prove intent because intent was not disputed and was inherent in the alleged act of strangulation. *Powell*, 126 Wn.2d at 262.

Similarly, in Mr. Stigall's case, there was no intent element other than that inherent in the definition of assault. The evidence of his alleged prior misconduct was not admissible to prove intent.

The state also argues that the evidence was properly admitted to establish "an element of a domestic violence crime." Brief of Respondent, p. 21. Respondent does not articulate which element that is. In order to prove the charged offense, the state had to show the existence of a valid

protection order, knowledge of the order, and an assault in violation of that order. RCW 26.50.110. Mr. Stigall was not charged with a domestic violence sentencing enhancement. CP 19-20. His alleged prior misconduct was not relevant to any element of the charged offense.

The state essentially argues that all prior acts in a relationship are admissible in any case alleging domestic violence "to ensure the jury has sufficient evidence to understand the dynamics of the relationship." Brief of Respondent, p. 21. Respondent cites no authority for this argument. *See generally* Brief of Respondent, pp, 19-22. The state's argument boils down to an impermissible propensity inference: that anyone who has engaged in domestic violence in the past is likely guilty of a charged domestic violence crime. RP 29. Such an inference violates due process. *Garceau*, 275 F.3d at 775.

The evidence of Mr. Stigall's alleged prior acts was not relevant to prove an element of the offense and should not have been admitted. His conviction must be reversed and the case remanded for a new trial. *Fisher,* 165 Wn.2d at 745.

C. The trial court failed to properly balance prejudice against probative value.

Evidence must be excluded whenever its probative value is substantially outweighed by the danger of unfair prejudice. ER 403.

Respondent argues that the court properly weighed the prejudice of the propensity evidence against Mr. Stigall because it excluded "hundreds, even dozen of undocumented, uncorroborated incidents from the alleged victim." Brief of Respondent, p. 21 (quoting the court at RP 21-22).

But a review of the portion of the record cited by the state leads to a different conclusion. Instead, it represents the court's attempt to ensure that the prior bad acts were only admitted if there was at least minimal corroboration. The court did not use the word prejudice or analyze the effect the evidence would have on the jury or on Mr. Stigall's defense. The state cannot point to any part of the record in which the court actually weighed the danger of unfair prejudice against the evidence's probative value.

The court infringed Mr. Stigall's due process rights, misinterpreted ER 403 and ER 404(b), and abused its discretion by admitting propensity evidence. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Mr. Stigall's conviction must be reversed, and the case remanded for a new trial. *Id.*

III. THE COURT MADE AN IMPERMISSIBLE COMMENT ON THE EVIDENCE.

Mr. Stigall relies on the argument in his Opening Brief.

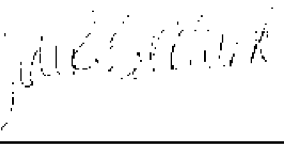
CONCLUSION

The court erred by admitting a protection order that was invalid on its face. The court misinterpreted the law, infringed Mr. Stigall's right to due process, and abused its discretion by admitting evidence of prior bad acts. The court impermissibly commented on the evidence by referring to White as "the victim" in its jury instructions.

Mr. Stigall's conviction must be reversed. The case must be remanded and the charge dismissed. In the alternative, the case must be remanded with instructions to exclude evidence of prior bad acts.

Respectfully submitted on January 7, 2014,

BACKLUND AND MISTRY



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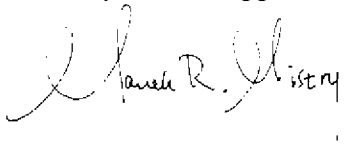

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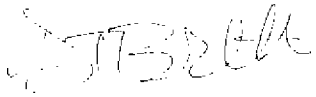

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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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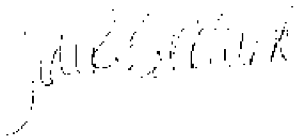
Signed at Olympia, Washington on January 7, 2014.



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